

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. Affidavit of
Mailing*

77-1175

To be argued by
BERNARD J. FRIED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1175

UNITED STATES OF AMERICA,

Appellee.

—v.—

MIGUEL RUSSO and FRANCOIS CHIAPPE,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

BERNARD J. FRIED,
PETER R. SCHLAM,
*Assistant United States Attorney,
Of Counsel.*

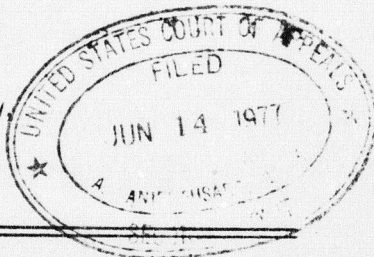


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1175

UNITED STATES OF AMERICA,

Appellee,

—v.—

MIGUEL RUSSO and FRANCOIS CHIAPPE,

Appellants.

BRIEF FOR APPELLEE

Preliminary Statement

Miguel Russo and Francois Chiappe appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Mishler, C.J.) on March 4, 1977, after a jury found each appellant guilty as charged in a one count indictment of conspiracy to traffic in heroin in violation of 21 U.S.C. §§ 173, 174. Russo and Chiappe were each sentenced to twenty year terms of imprisonment and \$20,000 fines. They are currently serving their sentences.

Each appellant raises various claims, none of which challenge the sufficiency of the evidence. Chiappe claims that: (1) there was error with respect to the Grand Jury testimony of an accomplice witness; (2) the District Court erred in denying his motion to dismiss the indictment on the ground that his presence in the jurisdiction was obtained in violation of due process, citing *United*

States v. Toscanino; ¹ (3) the District Court erred in admitting certain post-conspiracy evidence; and (4) the prosecutor allegedly suppressed certain documentary evidence. Russo contends that the Double Jeopardy Clause was violated by the District Court's refusal, at his first trial, to accept his waiver of a unanimous jury verdict or a jury of less than twelve; and by the prosecutor's alleged intentional failure to produce certain "3500" material ² of an accomplice witness.

Statement of Facts

A. The Trial.³

1. Introduction

This case involved a major heroin smuggling network operating between France, South America and the United States from 1965 to early 1968. The Government proved that appellant Francois Chiappe, a French national residing in Buenos, Argentina, was the initial financier of the conspiracy and provided the French heroin connection for his co-conspirators, Francois Rossi ⁴ and Michel Nicoli,⁵ two other French nationals also residing in

¹ 500 F.2d 267, *rehearing en banc denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand motion denied*, 398 F. Supp. 916 (E.D.N.Y. 1975.)

² 18 U.S.C. § 3500.

³ An earlier trial of Miguel Russo, in July 1976, resulted in the declaration of a mistrial by District Judge Thomas C. Platt, after the jury was unable to reach a verdict.

⁴ Rossi was convicted separately on this indictment following a jury trial in the Eastern District of New York (Mishler, C.J.). His conviction was affirmed on appeal in an opinion reported at 545 F.2d 814 (2d Cir. 1976) *cert. denied*, 97 S.Ct. 1178 (1977).

⁵ Nicoli, who testified for the Government, was convicted in the Eastern District of New York of various violations of the federal narcotics laws.

Buenos Aires. In mid-1967, appellant Miguel Russo joined the conspiracy and assumed responsibility for transporting the heroin from South America and France to the United States.

The *modus operandi* of the conspiracy was to obtain the heroin from Chiappe's connection in France and, using various smuggling methods, to import and sell the heroin to buyers in New York. In the early stages, the importation was accomplished by means of "body carries" by the conspirators, Rossi, Nicoli, and, on one occasion, Chiappe. Later on, in 1967, the conspirators recruited Russo to employ couriers to bring the heroin into the United States.

2. The Government's Case

Trip No. 1. In June 1965, Rossi and Nicoli told Chiappe in Buenos Aires, Argentina that they had a source of supply for cocaine but no money to buy the drugs. Chiappe replied that he had the money. Chiappe also suggested that they should use the proceeds of the cocaine sold to purchase heroin in Marseilles from a person he knew there and then resell the heroin in the United States (93-100). Chiappe then advanced \$6,000 which Nicoli used to purchase one and one-half kilograms of cocaine. This cocaine was "body carried" by Nicoli to Paris where it was sold. Nicoli, using the proceeds of the cocaine sale, bought two kilograms of heroin from one Pierre Poggi, an individual whom Chiappe arranged for Nicoli to meet in Marseilles. (101-104). Nicoli smuggled this heroin back to Buenos Aires where the three conspirators—Chiappe, Rossi and Nicoli—agreed that Rossi, using a false passport, would "body carry" the heroin into the United States and sell it for \$7,000 per kilogram (106-

107).⁶ Rossi, in turn, brought the heroin to New York, sold it here, and returned to Buenos Aires with \$14,000 (109). This money was divided among the co-conspirators, including Poggi and his associates. (110-111).

Trip No. 2. In October 1965, a second trip involving five kilograms of heroin was planned by Chiappe, Rossi and Nicoli in Buenos Aires. Again, Chiappe arranged for Nicoli to obtain the heroin in France (127-128). Nicoli went to France with one and one-half kilograms of cocaine, and then, using the cocaine proceeds, obtained five kilograms of heroin from Poggi. Nicoli and another Frenchman living in France each carried two and one half kilograms back to Buenos Aires (129-132). In November 1965, Rossi and Nicoli, using false passports,⁷ transported the heroin to New York and sold it. The proceeds of this transaction, \$40,000, were brought back to Buenos Aires and divided among Chiappe, Rossi, Nicoli and the conspirators in France.

Trip No. 3. A third trip was planned in December 1965 involving seven kilograms of heroin. This time, Chiappe introduced Nicoli to a French Seaman, Joseph Alfonsi, in Buenos Aires and Alfonsi agreed to bring five of the seven kilograms of heroin from France to Buenos Aires aboard his ship. (142-145). In February 1966, Nicoli took one and one-half kilograms of cocaine to Paris and, after selling them, purchased seven kilograms of heroin from Poggi. Nicoli himself "body carried" two of those kilograms to Buenos Aires (146) and he,

⁶ Nicoli testified that on this trip Rossi used a French passport in the name Marcel Jean Pierre Artiguelongue. INS records showed that in July, 1965 an individual using that passport entered the United States (Govt. Ex. No. 26; 125).

⁷ I.N.S. documents established that on November 17, 1965, one Francois Raniers entered the U.S. and Artiguelongue, both aboard the same flight. The same documents showed that both individuals left together for Buenos Aires on November 20, 1965. Nicoli testified that he used the Raniers passport and that Rossi used the Artiguelongue passport (Govt. Ex. Nos. 26 and 28; 125, 140.)

Chiappe and Rossi awaited Alfonsi's arrival with the remaining five kilograms. However, shortly after Nicoli returned to Buenos Aires, Alfonsi was arrested in France and the five kilograms of heroin were seized there.⁸ The two kilograms that Nicoli had brought to Argentina were then taken to New York by Rossi and sold for \$16,000. This money was brought back to Buenos Aires and divided among Chiappe, Rossi, Nicoli, and Poggi (147-149).

Trip No. 4. On December 15, 1966, while Nicoli was in jail in Buenos Aires on a charge unrelated to the conspiracy, Chiappe and Rossi, using false passports, made a trip to the United States with four kilograms of heroin and sold the heroin in New York.⁹ Despite his incarceration, Nicoli received a share of the proceeds.

Trip No. 5. In February 1967, the conspirators agreed to import nine kilograms of heroin into the United States (157). Chiappe arranged for Poggi to deliver the heroin in Madrid, Spain. Rossi, Nicoli and one Giovanni Parisio, a friend of Nicoli's, received the heroin from Poggi in Spain and "body carried" it by plane to Canada, where they switched to a train, travelling to New York via Chicago.¹⁰ The heroin was sold and the proceeds

⁸ A French police officer, Jean Ravanello, testified that on February 22, 1966, in the French port of Le Havre, a seaman named Joseph Alfonsi had been arrested for possession of five kilograms of heroin aboard the "Charles Tellier", a vessel then scheduled to depart for Buenos Aires. (913-917).

⁹ I.N.S. records established that Jean Pierre DeWaele entered the United States on December 15, 1966. (Govt. Ex. No. 30; 156). According to Nicoli, this was the false name used by Chiappe.

¹⁰ I.N.S. Records showed that one Maurice Rosen, arrived in the United States from Canada by train on February 25, 1976 together with one Jorge Carra and Giovanni Parisio. Nicoli testified that on this trip he used the Rosen passport, that

[Footnote continued on following page]

brought to Buenos Aires where, after paying \$5,000 to Parisio, it was again split among the conspirators.

Trip No. 6. A sixth trip was planned in March 1967 involving five kilograms of heroin. At this time, appellant Miguel Russo introduced Nicoli to one Paulo Gigante, a steward for Avianca Airlines, as a person who could transport heroin from France to the United States aboard his airplane (174-175). Chiappe, Rossi and Nicoli agreed that Gigante would receive five kilograms of heroin in Paris and deliver them to Nicoli in New York. (176-177) Nicoli and Rossi then travelled to Madrid where they arranged to sell the five kilograms of heroin to one Alberto Lorraine and deliver them in New York to Lorraine's associate, Claude Pastou (181-184). In May 1967, Nicoli went to New York via Miami, received five kilograms of heroin from Gigante, and then sold them to Pastou for \$55,000. Nicoli took the proceeds to Buenos Aires, stopping off in Bogota, Colombia¹¹ where he paid Gigante \$5,000. In Buenos Aires, the money was again split evenly between Chiappe, Rossi, Nicoli and the conspirators in France.

Trip No. 7. In June 1967, Chiappe, Rossi and Nicoli arranged another trip with Gigante, this time involving fourteen kilograms of heroin (191). Gigante again was

Rossi used the Larra passport, and that Paresio used his own passport. (Govt. Ex. No. 33; 166). Also, hotel records were introduced to prove that Nicoli, Rossi and Parisio stayed at this time in New York City (Govt. Ex. Nos. 20, 32-A; 171).

¹¹ I.N.S. records show that on May 30, 1967, one Miguel Dos Santos arrived in Miami from Madrid (Govt. Ex. No. 38; 183). I.N.S. records also show that Gigante entered New York on June 2, 1967 (Govt. Ex. No. 13; 190), and that Miguel Dos Santos departed the United States for Bogota, Colombia on June 6, 1967 (Govt. Ex. No. 38; 191). Nicoli testified that he was travelling under the name Miguel Dos Santos on this trip (183).

to receive the heroin in France and deliver it to Nicoli in New York. Nicoli and Chiappe told Gigante that they would be at the airport in Madrid and that Gigante, when stopping there enroute from Paris to New York, should signal them if the heroin was aboard the plane. (192-193). The heroin was to be sold in New York to Florencio Gonzalez and Raymond del Bono, whom Rossi and Nicoli had met in Buenos Aires. (195). Nicoli and Chiappe went to Madrid where Gigante signaled to them that he (Gigante) had the heroin. Nicoli then went to New York to meet Gigante. However, when Gigante did not arrive as scheduled, Nicoli called him in Colombia and learned that he had been arrested in Colombia and the heroin had been seized. Nicoli left New York and returned to Buenos Aires.¹² (196-203). In Buenos Aires, Nicoli learned from Chiappe that appellant Russo had left for Bogota, Columbia, to try to recover the seized heroin. (204). Shortly thereafter, Chiappe informed Nicoli and Rossi that Russo had succeeded in recovering the seized heroin, and Nicoli and Rossi travelled to the United States to receive the narcotics from Russo.¹³ (207). They met Russo¹⁴ in New York and received thirteen kilograms of heroin from him. (208-213). Russo told them that he had paid a \$10,000 bribe to the Colombian police in order to recover thirteen of the fourteen kilograms of seized heroin—the police had substituted a white powder for the thirteen kilos and had retained one kilogram. The heroin was

¹² I.N.S. documents established that Dos Santos (Nicoli) had arrived in the United States on June 28, 1967 (Govt. Ex. No. 42; 199) and departed in July 7, 1967 (Govt. Ex. No. 42; 203).

¹³ I.N.S. records established that Dos Santos (Nicoli) arrived in New York on August 10, 1967 (Govt. Ex. No. 44; 207), as did Marcello Gaspari (Rossi) (Govt. Ex. No. 18; 212).

¹⁴ Hotel records proved that Russo was in New York from August 10-13, 1967 (Govt. Ex. No. 18; 214).

then delivered to del Bono in New York. Rossi and Nicoli received an initial payment of \$60,000 from del Bono and Rossi took this money to Buenos Aires while Nicoli waited in New York for the balance. After receiving the rest of the money a few days later, Nicoli went to Miami, Florida, where he paid Miguel Russo, and from Miami, Nicoli returned to Buenos Aires where the proceeds were again divided between Chiappe, Rossi, Nicoli and the French supplier. (213-218).

Trip No. 8. In October 1967, the conspirators successfully imported nine kilograms of heroin into the United States. It was agreed that appellant Russo would recruit couriers, who would transport the heroin from France to the United States.¹⁵ (219-220). On October 21, 1967, Nicoli travelled via Miami to New York where he met Russo and received nine kilograms of heroin which Russo and his couriers had obtained in Paris. (227-228). Nicoli sold this heroin to Florencio Gonzalez. (228). Thereafter, Nicoli went to Miami where he paid Russo. Nicoli, Russo and Russo's couriers, Carmine Russo (appellant's brother), Andre Settembre and Guiseppe Nappa all returned to Buenos Aires aboard the same flight. In Argentina the proceeds were divided among Chiappe, Rossi, Nicoli and the sources of supply. (232).

Trip No. 9. A ninth trip, involving twenty-three kilograms of heroin, was planned in December 1967. Russo was instructed by Chiappe, Rossi and Nicoli to go to Paris with his couriers to receive the heroin and trans-

¹⁵ I.N.S. records showed that on October 21, 1967 Dos Santos (Nicoli) arrived in Miami (Govt. Ex. No. 47; 222). The same records established that on October 29, 1967, Dos Santos (Nicoli), Miguel Russo, Carmine Russo and other couriers left from Miami for Buenos Aires aboard the same flight (233-235).

port it to New York via Canada. (235-236). Thereafter, Russo returned to Buenos Aires and advised the conspirators that he had received the heroin in Paris and had given it to the couriers, who were to bring it to New York via Canada. However, the couriers, including appellant's brother, Carmine, were arrested in Montreal, and the heroin was seized by members of the Royal Canadian Mounted Police.¹⁶ When Russo learned in New York of the arrests of the couriers in Canada, he returned to Buenos Aires.¹⁷

Trip No. 10. The final trip of the conspiracy took place in February 1968 and involved three kilograms of heroin, which Chiappe, Rossi and Nicoli had in Buenos Aires. Nicoli asked Russo to locate a courier for this heroin and Russo introduced him to a pilot named Rolando who agreed to transport it by plane to Miami from Argentina. The heroin was delivered to Russo, who gave it to the pilot. On February 14, 1968, Nicoli, using false documents in the name of Abraham Goldman, went to Miami to meet Rolando.¹⁸ However, on his arrival in Miami, Nicoli was detained by the authorities for several hours. Because of this, Nicoli decided not to meet Rolando. Instead, he went to New York and arranged for the buyer, Florencio Gonzalez, to send one Roberto Martinez to Miami to pick up the

¹⁶ Officer Leo Daigle, Royal Canadian Mounted Police, testified that on December 13, 1967, he arrested Carmine Russo, who had arrived from Paris with four kilograms of heroin taped to his body. Also, arrested were other couriers. (878-884).

¹⁷ I.N.S. records established that Russo arrived in New York from Paris on December 13, 1967 (Govt. Ex. No. 53; 239). Moreover, former Customs Agent Philip Doukas testified that on that day, he had examined Russo when he arrived at J.F.K. International Airport, Queens, New York (901-904).

¹⁸ I.N.S. records showed that Abraham Goldman (Nicoli) arrived in Miami from Buenos Aires on February 14, 1968 (Govt. Ex. No. 54; 281).

heroin from Rolando. Martinez agreed and went to Miami to pick up the heroin. Nicoli received the proceeds and left New York on February 16, 1968,¹⁹ for Buenos Aires, where the money was divided among Chiappe, Rossi, Nicoli and the source of supply. (278-283).

Other evidence. Through the testimony of Alberto Jesus Borsalino, an Argentine Police Officer, it was established that on May 17, 1968, appellant Chiappe and his wife were surveilled near their home in Buenos Aires. (940-943). When the police asked Chiappe to identify himself that day, Chiappe produced an Italian passport and identity card in the name Silvio Bianchi (Govt. Ex. Nos. 59 and 60; 950-952). In addition, his wife's pocket-book was searched and found to contain \$19,000 in United States currency. (954). Mrs. Chiappe told the police officers that her husband had given her the \$19,000 before she left the house. (957). Thereafter, a search was conducted of Chiappe's apartment which resulted in the seizure of two photographs (Govt. Ex. Nos. 25 and 56; 954), depicting Chiappe, Rossi and Nicoli together. (999).²⁰

3. The Defense Case

Neither Russo or Chiappe, testified in his own behalf. Russo introduced no evidence at all. Chiappe, on the

¹⁹ This date was determined from the I.N.S. records (Govt. Ex. No. 54; 281).

²⁰ Prior to the admission of this evidence, the district court conducted a hearing to determine its admissibility. At this hearing, Borsalino and an Argentine Judge, Dr. Rene Eduardo Daffis Niklison, testified for the Government (672-740; 747-772). Chiappe testified in his own behalf. (812-840).

At the conclusion of this hearing, Chief Judge Mishler rendered an oral opinion and permitted the introduction of the evidence (841-847).

other hand, presented limited "alibi" evidence, by way of depositions taken in Buenos Aires, Argentina. Through this testimony, Chiappe sought to establish that from approximately January, 1968, through March, 1968, he was at all times staying in LaFalda, near Cordoba, Argentina, and that, therefore, he was not in Buenos Aires as testified to by Nicoli.

ARGUMENT

POINT I

Chiappe's Motion To Dismiss The Indictment On The Ground That The Court Lacked Personal Jurisdiction Due To An Alleged Violation Of *United States v. Toscanino*²¹ Was Correctly Denied.

Citing *United States v. Toscanino*, *supra*; *United States ex rel. Lugan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 95 S. Ct. 2400 (1975); and *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), Chiappe argues that the district court erred in denying his motion to dismiss the indictment. In a convoluted argument, relying heavily on irrelevant newspaper and magazine articles having no relation to this case as well as on other irrelevant commentary, he claims that the Government illegally secured his presence in federal court. We respectfully submit that this claim is without merit. Chiappe has both ignored the facts of this case and the relevant law.

²¹ 500 F.2d 267, *rehearing en banc denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand motion denied*, 398 F. Supp. 916 (E.D.N.Y. 1975).

A. Chiappe's arrest and expulsion from Argentina.

At a post-trial *Toscanino* hearing, it was established that Chiappe was expelled to the United States by the Government of Argentina pursuant to a Decree of Expulsion signed by the Argentinian Minister of the Interior.²² The events that led to this expulsion as found by Chief Judge Mishler and which were, we submit, amply supported by the record, are as follows:

²² This Decree, in its entirety, is as follows:

THE NATIONAL EXECUTIVE POWER

M 518

BUENOS AIRES, May 21st, 1976

IN VIEW of the provisions contained in Law no. 21.259 and,

WHEREAS:

The National Executive Power has the authority to order the expulsion of foreign individuals, whether they be permanent residents or non-permanent, who are involved in acts or activities cited in article 1st. of the above mentioned Law.—

The French citizen Francisco CHIAPPE, holder of Identity Card No. 7.159.174 (P.F.A.) is undoubtedly covered by the provisions of Law No. 21.259, since he has carried out—in Argentina—activities that substantially affect the social welfare and the public order and are contrary to the permanent interests of the Republic.—

In accordance to the principles established by the mentioned Law, the resolution passed by the National Executive Power is not appealable and it has to be executed within a peremptory delay of five days to run from the date on which the resolution has been notified.

Therefore,

THE PRESIDENT OF THE ARGENTINIAN NATION DECREES:

ARTICLE No. 1.—It is ordered that the French citizen Francisco CHIAPPE, holder of Identity Card No. 7.159.174

[Footnote continued on following page]

On March 31, 1976, Bernard Fried, Assistant United States Attorney for the Eastern District of New York and Chief of the Narcotics Section, conferred with Special Agent Gregory Phillips of the Drug Enforcement Administration ("DEA"), and representatives of the Immigration and Naturalization Service and the Department of Justice, in Washington, D.C. Discussion centered around the treatment to be accorded fugitive defendants expelled by the Argentinian Government. In light of *Toscanino*, Mr. Fried advised them not to participate in any expulsion. On April 27, 1976, Mr. Fried arrived in Buenos Aires with a legal adviser to the Department of State. The following morning they met with Rahyn Tryan, Special Agent of the D.E.A. in charge of the Buenos Aires office, and Mr. Phillips, to instruct the Argentinians on the need to avoid mistreatment of any suspects because of the possibility that subsequent prosecution might be invalidated

(P.F.A.), be expelled from the Republic of Argentina and not to be allowed to re-enter the country in compliance with the terms expressed in Law No. 21.259.

ARTICLE No. 2.—The expellee is to be held under arrest until the time the measure ordered in Article No. 1 goes into effect.

ARTICLE No. 3.—The present decree will be immediately executed by the Ministry of the Interior.

ARTICLE No. 4.—Let it be known, let it be published, let it be forwarded to the National Administration of the Official Registry and let it be filed.—

DECREE No. 518

(Two illegible signatures)

Brigadier General Albano E. HARGUINDEGUY

Minister of the Interior

This is an exact and accurate copy of the original

Buenos Aires July 16, 1976.

(Illegible Signature)

Lieutenant Colonel JUSTO J. ROJAS ALCORTA

under *Toscanino*. The next day, Fried met with Ambassador Robert Hill, and asked him to convey to the Argentinian Minister of the Interior, his concern about the treatment of citizens or residents of Argentina who might be turned over to the United States Government for prosecution on narcotics charges.

Sometime prior to May 21, 1976, the United States Government advised the Argentinian Government of the charges pending against both Chiappe and Russo and of its willingness to prosecute them. On May 21, 1976, at about 3:00 P.M. Chiappe was driving his car in the company of his wife in LaFalda, Argentina. Ten to twelve Argentinian police officers riding in three vehicles brought his vehicle to a stop. They exited their vehicles and forcibly removed Chiappe from his car without identifying themselves. Chiappe, believing that he was being kidnapped by guerrillas, resisted arrest. The police assaulted him knocking his teeth out and causing other injuries about the head and body. The police then handcuffed him or otherwise tied his hands behind his back, tied his feet, blindfolded him, and forced him into a vehicle. He was driven to one location and then flown to another. A strait jacket replaced the binding on his wrists; the blindfold remained. Chiappe recognized the presence of one Miguel Russo and one Yolanda (Samiento). He was kept in the strait jacket and blindfolded for five days in the same room with both of them.

On May 26, 1976, Chiappe, Russo and Samiento were driven under Argentinian guard to Buenos Aires Airport. In the meantime, DEA agents flew to Argentina to take custody of the three. They arrived on a Braniff Airlines flight chartered by the United States on May 26, 1976 at about

9:30 P.M. The Argentinian police accompanied the three prisoners aboard the plane, placed them in the custody of the United States agents, and then left the aircraft. The plane was in flight soon after midnight of May 27, 1976. Approximately fifteen minutes out of Buenos Aires Airport, Special Agent Corcoran, assigned to guard Chiappe, removed the strait jacket and blindfold. The airplane arrived at John F. Kennedy International Airport on the morning of May 27, 1976. (Memorandum Opinion, pp. 2-5; Chiappe's Appendix, Item 49).

Chiappe contended through the deposition testimony of his wife, taken in Buenos Aires, that there were English-speaking foreigners present at the time of his arrest on May 21, 1976 in Cordoba, Argentina (Transcript, November 20, 1976, pp. 234-237). He further contended, by his own testimony, that there were English-speaking persons present after his arrest and before his expulsion to the United States (Hearing Transcript, January 7, 1977, at pp. 25-27) and that they may have been present while he was being beaten (*Id.* at p. 28). He identified Special Agent Polombo, of the Drug Enforcement Administration, as the individual who was present at a farmhouse in Argentina where he received these beatings, a day or so before he was taken to the airport. (Hearing Transcript, January 14, 1977, at pp. 36-36a; compare Hearing Transcript, January 7, 1977, at pp. 34-35). Agent Polombo, however, testified that the first time he had seen Chiappe was when Chiappe was brought aboard the airplane on May 27, 1977, when he was expelled from Argentina. Agent Polombo had never been in Argentina before. Moreover, following his arrival in the United States and after being advised of his *Miranda* rights, Chiappe told Assistant United States Attorney Fried that he had at no time *before* boarding

the airplane heard or seen any English-speaking persons. (Hearing Transcript, January 7, 1977, at pp. 84-89).

B. Findings of the District Court.

Upon completion of the *Toscanino* hearing, Chief Judge Mishler found the facts described above. The Court expressly "reject[ed] the testimony of Chiappe and his wife concerning the presence of English-speaking people at the time of his arrest and during his incarceration in Argentina believing it to be "a fabrication crudely designed to fit the *Toscanino* standards for defeating personal jurisdiction otherwise obtained over non-resident aliens". (Memorandum Opinion, p. 6; Chiappe's Appendix, Item No. 45). Moreover, the Court rejected as "unworthy of belief" Chiappe's testimony "that he was beaten repeatedly during" the period of his incarceration in Argentina (*Id.* at p. 4, n.3).

Applying the controlling legal principles to these facts, the Court concluded (*Id.* at pp. 9-10):

[T]hat the United States advised the Argentinian Government of the pending narcotic charges against Chiappe and others, and its intention of prosecuting the charges if it obtained jurisdiction over them. It urged the Argentinian Government to avoid any acts which might place United States jurisdiction over defendants in doubt. No United States official or agent participated in any decision relating to the time or manner of effecting Chiappe's arrest or his subsequent incarceration in Argentina. Nor was any American official or agent present at the time of Chiappe's arrest or during his incarceration in Argentina. The first contact any United States official or agent had with Chiappe was the Braniff airplane at Buenos

Aires Airport on May 26, 1976, at about 9:30 P.M. prior to take-off on its flight to John F. Kennedy International Airport.

Accordingly, the motion is in all respects denied, *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225 (1886), *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509 (1952), and it is SO ORDERED.

C. The Court Correctly Denied the Motion to Dismiss the Indictment.

Extensive treatment of the relevant case authority, i.e., *Toscanino*, *Lujan*, *Lira* and the recent decision in *United States v. Orsini*, Dkt. No. 77-1019 (2d Cir. May 17, 1977) affirming on op. below, 424 F.Supp. 229 (E.D. N.Y. 1976) is unnecessary since the district court, in a finding amply supported by the record, determined that there was no participation by representatives of the United States Government "in any decision relating to the time or manner of effecting Chiappe's arrest or his subsequent incarceration in Argentina. Nor was any American official or agent present at the time of Chippe's arrest or during his incarceration in Argentina". This finding coupled with the court's determination that Chiappe had not been mistreated while in the custody of the Argentinian Government²³ simply means that there was no misconduct as required to be established by *Toscanino*. Accordingly, divestiture of jurisdiction is not required.

²³ Following his arrival in the United States, Chiappe was asked by Chief Judge Mishler; "How about you Mr. Chiappe? Do you claim that the Argentine police or any law-enforcement agency there abused you in Argentina? Chiappe answered "No" He thereafter answered "no" to the further question whether he "claimed that any [American] agent participated in any way in that activity" (Transcript, May 27, 1976, p. 8).

In apparent recognition of this inevitable result, Chiappe argues that the fact that he was kept blindfolded and straight-jacketed by the DEA agents after they assumed custody of him and "until at least 15 minutes into the flight to the United States," constituted "torture" by the United States agents (Chiappe's Brief, pp. 16-17). We contend that this is nonsense. As Judge Mishler found, the earlier physical restraints and blindfolding were not physical abuse (Memorandum opinion, p. 4). *A fortiori*, the additional 15 minutes following takeoff until these items were removed did not constitute physical abuse. Moreover, upon his arrival in the United States, Chiappe stated to the prosecutor that he had been "properly treated by the Americans." And, immediately thereafter, at his arraignment, he told Chief Judge Mishler that he had not been abused by American agents. Thus, under no circumstances was the fifteen additional minutes of restraint and blindfolding, the condition in which Chiappe had been turned over to the American agents, "outrageous and reprehensible" conduct. *United States ex rel. Lujan v. Gengler*, 510 F.2d, *supra* at 65.

Finally, the expulsion decree issued by the Argentinian Government disposes of the claim that Chiappe was denied any alleged rights under Argentinian law. *United States v. Lira*, *supra* at 71-72.²⁴

²⁴ The claim that jurisdiction should be divested "if for no other reason than that abductions such as appellant's require careful planning and significant expense" (Appellant's Brief, p. 21), we deem too frivolous for comment, but indicative of the lack of merit to this entire argument.

POINT II

The Cash Seized, Incident To The 1968 Arrest Of Chiappe And Wife, In Argentina, ^{was} Properly Admitted As Relevant Evidence Of Chiappe's Narcotics Activities.

Chiappe argues that Chief Judge Mishler erred in admitting into evidence \$19,800²⁵ that was seized from Mr. and Mrs. Chiappe at the time of their 1968 arrest in Argentina. Of this money, \$800 had been seized from Chiappe and the remaining \$19,000 was taken from Mrs. Chiappe's handbag. (953-954). At the time, in the presence of Chiappe, his wife told the Argentinian police that Chiappe had given it to her before she left the house. (957). We submit that Judge Mishler acted well within his discretion in admitting this evidence.²⁶

The evidence of the cash was properly admitted as circumstantial evidence of Chiappe's participation in the conspiracy. *E.g.*, *United States v. Magnano*, 543 F.2d 431, 437 (2d Cir. 1976); *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States v. Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

²⁵ Actually, a photograph of this money was introduced into evidence (Govt. Ex. No. 61; 957).

²⁶ False documents were also seized from Chiappe (Govt. Ex. Nos. 59 and 60; 951-952). In addition, two photographs of Chiappe and co-conspirators Nicoli and Rossi were seized from Chiappe's home (Govt. Exs. No. 25 and 56; 999). Although referred to in the opening paragraphs of his brief on this Point, (Chiappe's Brief, p. 23), they are not mentioned again. Accordingly, we consider this argument to be addressed solely to the monies and related declarations of Mrs. Chiappe.

Contrary to appellant's argument, the fact that this money was seized approximately three months after his participation in the conspiracy terminated does not render the evidence inadmissible. The lapse of time between the end of Chiappe's association with the conspiracy and the seizure of the evidence goes to the weight to be given by the jury to the evidence and not to its admissibility. See *United States v. Tramunti*, *supra* and *United States v. Schwartz*, *supra*.

Nor does the fact that there was no connection between the cash and the crime charged render the evidence inadmissible. *United States v. Magnano*, *supra* at 437. Indeed, the suggestion that this money was the proceeds of another crime, *i.e.*, bank robbery, as stated in *Tramunti*, *supra* at 1105, likewise "goes only to the weight, not admissibility, of the evidence."²⁷ As Chief Judge Mishler held, the fact that the arrest was in connection with a bank robbery investigation would not "mean the [monies] seized are unrelated to the deal in narcotics" 961).

Finally, the admission of Mrs. Chiappe's statement, in the presence of her husband to the Argentine police officer, that he had given her the money just before they left home was not improper. As Judge Mishler held, "under the circumstances of this case * * * there's a fact question for the jury as to whether she spoke for him" (850). He then charged the jury as set forth in the margin.²⁸

²⁷ There is no support in the record for Chiappe's assertion that "a Federal Examining Judge in Argentina found, to his satisfaction, that Mrs. Chiappe was legitimately in possession of the \$19,000" (Chiappe's Brief, p. 25).

²⁸ "The Court: This witness [Argentine Police Officer Borsailvo] testified this is a statement made by Mrs. Chiappe. Mr. [Footnote continued on following page]

We contend that the admission into evidence of this statement as an "authorized" admission was entirely correct. Rule 801(d)(2)(c), Fed. R. Evidence.

POINT III

There Was No Error With Respect To The Grand Jury Testimony Of The Government's Accomplice Witness.

Russo contends that the prosecutor suppressed the February 15, 1973, Grand Jury testimony of accomplice witness, Michel Nicoli, which testimony, so the argument runs, would have demonstrated that this witness allegedly committed perjury. The short and complete answer to this contention is that, as the record conclusively shows, these Grand Jury minutes were again turned over to counsel at the retrial. Indeed, they had been turned over to Russo's defense counsel, Ms. Rosner, at the first trial in July 1976. This argument, therefore, we submit is completely without merit.

Nicoli's February 15, 1973 Grand Jury Minutes were marked on July 7, 1976 as Government Exhibit 3500-3 (Transcript, July 7, 1976 at p. 3; see, also Exhibit Sheet, Govt. Appendix, A22). Indeed, the cover page of these minutes contains an exhibit marker dated July 7, 1973 (Govt. Appendix, A1). Moreover, the same minutes were similarly marked and turned over on January 5, 1976, during the trial of co-defendant Francois Rossi (*Id.* at A22). (Presumably, an experienced counsel, such as Ms. Rosner, would have, therefore, been aware of this material well before even the first trial.)

Chiappe is not bound by what his wife said unless under all the circumstances you find that Mrs. Chiappe was authorized to speak for Mr. Chiappe with reference to the ownership of that money. Otherwise, disregard it." (957).

At the beginning of the retrial, Ms. Rosner, Russo's counsel, stated to the district court: "I am in possession of the 3500 material from the last trial" (14-15). On November 23, 1976, the second day of the retrial Ms. Rosner again advised the court that she had the 3500 material from "the last trial" (243).

Because these minutes were in the possession of counsel literally months in advance of the retrial, as well as, of course, at the original trial, any claim of Government culpability is totally frivolous. Moreover, having had these minutes available for cross-examination of Nicoli, it is equally frivolous to now argue that his testimony was prejudicial and designed "to avoid any Statute of Limitations problem" (Russo's Brief, p. 29). This is especially so since the statute of limitations defense, pressed by appellant Chiappe, was expressly waived by Russo at both trials (1097).

POINT IV

The Retrial Of Russo Was Not Barred By The Double Jeopardy Clause.

A. Introduction

Appellant Russo was first tried alone in July, 1976. The case was submitted to the jury after two days of testimony. After a day and one-half of deliberations the jury reported that it was deadlocked. Defense counsel suggested that appellant would accept a majority verdict, and the prosecutor initially agreed. Judge Platt also initially accepted the proposal but required that the waiver of a unanimous verdict be in writing. Before a written waiver was executed, however, Judge Platt expressed serious reservations about a non-unanimous verdict. Defense counsel attempted to counter these reser-

vations by proposing that the minority on the jury be excused and accepting the "unanimous" verdict of the remaining majority. The Government did not consent to this and when Judge Platt continued to express doubts, the prosecutor withdrew his consent to the majority verdict suggestion. The jury continued to be deadlocked, and a mistrial was declared.

Appellant, who did not raise this claim prior to the retrial, now argues that Judge Platt erred in not accepting the proposals by the defense and that his declaration of a mistrial was, therefore, unnecessary. He concludes the argument by claiming that his retrial was barred by the Double Jeopardy Clause and that, accordingly, the indictment must be dismissed.

This argument is without substance. First, assuming that the requirement of a unanimous jury verdict can be waived, any such waiver requires the consent of the Government and the approval of the Court. In this case, the Government and the Court declined to consent to the procedure. Second, appellant waived any double jeopardy claim arising from his first trial by failing to raise it until two months after he had been found guilty at the trial. Third, neither the Government nor the Court ever consented to the proposal to discharge the minority of jurors to obtain a "unanimous" verdict of the majority. Fourth, the requirement of a unanimous verdict cannot be waived.

B. Factual Background

Before turning to the argument, we first set forth the events at the first trial that give rise to this claim. Following a two day trial, the jury was given the case at 10:40 A.M. on Friday, July 9, 1976. Unable to reach a verdict that day, the jury was excused until 10:00 A.M., the following Monday, July 12, 1976. After an "Allen"-

type charge was given on Monday at 2:40 P.M., the Court discussed with counsel the possibility of beginning a retrial the following day (21A). During this discussion the Court was advised that both the prosecutor and defense counsel were willing to accept a majority verdict (21A—22A). The Assistant United States Attorney stated "If it is lawful, your Honor, we will go for it". (22A).

At this point, at defense counsel's request, the Court conducted an oral inquiry of Russo concerning his understanding of the proposed waiver (24A-27A). After questioning Russo, the Court stated it would accept the waiver but "in an excess of caution, [would] require that the consent and waiver be in writing"²⁹ pursuant to Rule 23, Fed. R. Crim. P. (27A).

The prosecutor then asked the Court if it "would it be all right if I just had two minutes to go up and make sure that Mr. Trager [United States Attorney] agrees with me?" The request was granted. (29A). Thereafter, and while waiting the return of the prosecutor, the Court concluded that the requirement of a unanimous

²⁹ Judge Platt, in determining whether Russo understood the proposal for a non-unanimous verdict, phrased the proposal as follows: "In essence, what you would be doing would be saying to this Court that we could take a head count of the jury, and if the majority, if seven or more came in for either conviction or acquittal you would then leave it in this Court's hands to declare the verdict as if there had been no jury and I would act in accordance with that head count. Do you understand that" (25A).

Appellant now claims that this statement by the Court constituted an alternative procedure involving the waiver of a jury trial and a trial by the Court, with the difference that the Court would be bound to follow the vote of the jury (Russo's Brief, at p. 9; see also p. 21, fn.*). Clearly Judge Platt, however, was only seeking to explain the proposal in simple, colloquial English. Accordingly, we do not treat this explanation as a third distinct proposal.

jury is jurisdictional and therefore cannot be waived.³⁰ (32A).

Upon his return and before the prosecutor could speak, the Court advised him of its conclusion. Counsel then asked to confer with the prosecutor to try to "resolve the problem". Ultimately, citing *United States v. Vega*, 447 F.2d 698 (2d Cir. 1971), counsel proposed dismissing the minority jurors whose numbers was unknown and treating the majority as the "unanimous jury" (33A). The prosecutor *never* consented to this proposal and following an off-the-record discussion with defense counsel informed the Court: "Your Honor, for the record, I'd like to state that after discussions with Ms. Resner [defense counsel] and after listening to the opinion of the court [which was that the Government may be walking into a trap (37A)] we are unable to enter into any agreement such as the one previously discussed in this case" (39A). This ended the matter.

The jury was ultimately discharged over defense objection at 5:00 P.M., after being advised by the Foreman that the jury was hopelessly deadlocked. (43A-44A). The jury reported that its vote was 8 to 4 for acquittal. (45A). At no time prior to this point was the jury vote known to any parties or to the Court.

Following the retrial, a guilty verdict was returned on December 8, 1976. Thereafter, by motion filed February 15, 1977, appellant sought dismissal of the indictment, claiming that the retrial was barred by the failure of the court at the first trial to allow the suggested procedures concerning the verdict. On February 18, 1977, this motion was denied by Chief Judge Mishler (66A).

³⁰ The Court so concluded by reference to 8A Moore's Federal Practice, ¶ 31.02[1], pp. 31-3 to 31-4. (30A-31A).

C. Failure To Claim Double Jeopardy Before Retrial Constituted A Waiver

The failure by appellant to timely raise his claim of Double Jeopardy before retrial constituted a waiver of that claim. Thus, the issue is not properly before this Court for a determination on the merits.

The rule is well-settled that a defense of former jeopardy, "if not affirmatively pleaded by the defendant at the time of his trial will be regarded as waived" *United States v. Scott*, 464 F.2d 832, 833 (D.C. Cir. 1972) (see cases collected therein); See, also, *United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977), *mot. to extend time for cert. pet. filed July 8, 1977*; cf. *United States v. Estrema*, 531 F.2d 1103, 1110 (2d Cir. 1976); Rule 12(b)(2), Fed. R. Crim. P. Nevertheless, appellant contends that as a result of *Menna v. New York*, 423 U.S. 61 (1975), *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Robinson v. Neil*, 409 U.S. 505 (1973), the rule is no longer viable. We disagree.

Robinson, *Blackledge* and *Menna*, all involved state defendants who had pleaded guilty and then sought to attack their convictions on double jeopardy grounds (although strictly speaking, in *Blackledge*, the Supreme Court found it "necessary" only to reach a due process point). The waiver issue was not addressed or treated in *Robinson*; the Court merely held *Waller v. Florida*, 397 U.S. 387 (1970)³¹ to be retroactive. In *Blackledge*, however, the Court held that a guilty plea was not a bar to a federal habeas corpus petition alleging both a denial of double jeopardy and a deprivation of due process.

Thereafter, in *Menna*, the Supreme Court, citing *Blackledge v. Perry*, remanded a state appeal from a plea

³¹ *Waller* held that the double jeopardy clause was applicable to separate state and municipal prosecutions.

of guilty for a determination of a double jeopardy claim on the merits. However, in *Menna* the Court noted:

“We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute” (423 U.S. *supra* at 62-63, n.2 esp. 63; emphasis added).

Thus, contrary to defendant's argument, the cited cases do not hold that a federal defendant, by failing to raise the issue of double jeopardy before trial, does not waive it.

In both *Menna* and *Blackledge*, each defendant had been previously tried and convicted and then, was again haled into court on what amounted to the reprosecution for the identical offense. Indeed, “[t]he very initiation of the proceedings in *Menna* operated to deny the defendant his right against double jeopardy.” *United States v. O'Donnell*, 539 F.2d 1233, 1237 (9th Cir.), *cert. denied*, 97 S.Ct. 386 (1976). It is this treatment, which offends the basic notion that the double jeopardy “assures an individual that, among other things, [he] will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.” *Abney v. United States*, — U.S. — Dkt. No. 75-6521, Slip op. pp. 9-10 (decided June 9, 1977). See also, *United States v. Jenkins*, 420 U.S. 3581 370 (1975); *Green v. United States*, 355 U.S. 184, 187 (1957). Where a defendant pleads guilty to the second or renewed charge, that plea frequently is to avoid just these concerns which bottom the double jeopardy right.

On the other hand, when a defendant, fully aware of the double jeopardy issue, proceeds without objection to retrial, not on a later or new indictment but on the very

same instrument which originally "haled" him into court, the underlying concerns of the double jeopardy clause have been dissipated by the *very* act of that defendant. He can no longer complain that the power of the State "subjected him to the hazards of the trial" with the attendant evil effects of a second trial. Indeed, to avoid this pain of two trials, it is now settled that, prior to the retrial, Russo could have raised the defense of former jeopardy and, if unsuccessful, immediately have appealed from the pre-trial order denying the claim. *Abney v. United States*, *supra*. The Supreme Court, in affirming this pre-trial right, stated that otherwise a defendant would be "forced to endure a trial that the double jeopardy clause was designed to prohibit, *Ibid. United States v. Alessi*, 536 F.2d 978 (2d Cir. 1976) ; ³² *United States v. Beckerman*, 516 F.2d 905, 906-907 (2d Cir. 1975).

Here, Russo, represented by experienced counsel chose not to pursue the issue before retrial and no explanation has been advanced. Thus it is reasonable to conclude that the decision not to raise the somewhat dubious point was in the hope of gaining an acquittal which the vote of the first jury indicated was a possibility. Having miscalculated, Russo first came forward to raise the issue after he was convicted. *Blackledge v. Menna*, does not require that such gamesmanship be countenanced. As this Court observed in a somewhat related context, by failing to timely raise the issue, the defendant "implicitly expressed a willingness to take his chances [with the case] as then [about to be] presented, and we are not inclined to allow him to hedge his bets by seeking acquittal by the jury and then, if convicted, demand reversal on grounds of double jeopardy" *United States*

³² We note that counsel in the *Alessi* case was Ms. Rosner, who represented Russo below and represents him before this Court. Thus, it cannot be claimed that the defense was unaware of this pre-trial procedure.

v. *Estremera*, 531 F.2d *supra* at 1110. Cf. *United States v. Gogarty*, 533 F.2d 93, 95-96 (2d Cir. 1976).

In a like situation, the Fifth Circuit in *United States v. Beasley*, *supra*, recently held that the failure to raise the claim of double jeopardy prior to a retrial, following an earlier declaration of a mistrial, constituted a waiver of the claim. The Court noted that Rule 12(b), Fed. R. Crim. P., required the issue to be raised "prior to his second trial" *Id.* at 275. The purpose of Rule 12 is, of course, "to prevent unnecessary trials". *United States v. Swainson*, 548 F.2d 657, 663 (6th Cir. 1977). Accordingly, where as here, all of the facts relevant to the claim were known long before the trial began, it was incumbent upon Russo to assert a timely double jeopardy claim or be deemed to have waived it.

D. Necessity for Consent by Court and Prosecutor

As the above recitation of facts makes clear, the Court ultimately refused to sanction the proposed majority verdict proposal. It never approved appellant's request to excuse the minority and accept the "unanimous" verdict of the majority. Likewise, the prosecutor never agreed to excusing the minority of the jury, and he finally informed the Court that the Government would not consent to any of the defense suggestions. This lack of consent, we submit, completely disposes of the claim.

Concerning the requirement for waiving a jury of twelve, Rule 23(b) of the Federal Rules of Criminal Procedure expressly requires the "approval of the court" together with a written stipulation between the parties. These requirements have their origins in *Patton v. United States*, 281 U.S. 276 (1930), in which the Supreme Court held that a defendant in a criminal case could waive a jury of twelve but that "before any [such] waiver can become effective, the consent of the govern-

majority verdict proposal appears to have been his own determination that it was unlawful. Moreover, regarding defense counsel's suggestion concerning a jury of less than twelve, the Court was never asked to sanction this proposal because the Assistant United States Attorney did not consent to it. We submit that the Court was not required to accept the defendant's waiver of the twelve person jury requirement, or the unanimity requirement, in the absence of consent by the Government.

Indeed, defense counsel significantly did not protest the withdrawal of consent to the waiver of the unanimity requirement by the prosecutor or move to have the waiver of the twelve man jury requirement accepted after it was clear there would be no consent. Counsel only objected "to the declaration of a mistrial this early in the day" (39A).³³

Moreover, the rule that the Court approve waiver of trial by a jury of less than twelve or a jury trial altogether, means, of course, that "the duty of the trial court in that regard is not to be discharged as a matter of rote, but with sound and advised discretion". *Parker v. United States*, 507 F.2d *supra* at 589. Or, as this Court said in a related context in *United States v. Gori*, 282 F.2d 43, 45 (2d Cir. 1960), *affd.* 367 U.S. 364 (1961):

³³ The jury was then called into the courtroom and told to continue its deliberations. One-half hour later, the jury was brought back into the courtroom and when Judge Platt determined that there would be nothing to be gained by further deliberations, he discharged the jury. This occurred at 5:00 P.M., on the second day of deliberations. Appellant, of course, does not contend that the jury should have been held longer, but rather that the proposals set forth constituted viable alternatives to the mistrial. *United States v. Grasso*, Dkt. No. 76-1284, Slip op. 2247, 2256 (2d Cir. March 9, 1977). Since the alternatives for the reasons set forth in this point were not viable, declaration of the mistrial was proper. *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975).

"It has been a source of pride federal-wise that a United States district judge is more than a mere automaton or referee and bears an affirmative responsibility for the conduct of a criminal trial. This responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal. If the accused retains essentially a power of veto on pain of ban of all prosecution, even though fully justified, it is clear that the judge does not retain control of his courtroom and cannot act as he thinks necessary either to protect the interests of the litigants or to preserve proper respect for federal law administration.

We believe that Judge Platt's actions were consistent with *Gori's* statement of the responsibilities of a district judge especially when faced with a novel proposal touching on fundamental constitutional rights. Judge Platt quickly researched the issue and determined that the authorities disapproved the majority verdict proposal. He then acted to "protect the interests of the litigants". Next, he voiced—as well he should have—his concern over the second proposal, a proposal unabashedly designed to avoid the difficulty posed by the first proposal. This assiduous concern for the proper administration of criminal justice was concededly an important factor in the refusal, of the Government to consent to the second proposal. And, thus, we submit that the withholding of consent, if reviewable at all, was proper.³⁴

³⁴ Interestingly, appellant continually refers to three proposals—waiver of a unanimous verdict, waiver of a jury of twelve, and waiver of a jury trial—when there were only two proposals. The significance of this misstatement is that it permits defendants to now contend that "[e]ven assuming the extremely dubious proposition that an accused cannot waive

[Footnote continued on following page]

E. Unanimous Verdict Requirement

The foregoing argument assumes that a majority verdict, agreed to by all the parties, with the consent of the Court, would be proper. However, we contend that the unanimity requirement cannot be waived. Thus, we urge that appellant is incorrect in his claim that the District Court erroneously concluded that the right to a unanimous jury verdict in a federal criminal trial could not be waived and that the Court, therefore, improperly refused to permit him to do so.³⁵

It is, of course, undisputed as Justice Powell put it: "That unanimity is one of the *indispensable* features of federal jury trial" *Apodaca v. Oregon*, 406 U.S. 404 (1972) (concurring opinion [406 U.S. 366 at 369]; em-

unanimity in the federal courts, the *other two* suggested procedures were proper and Russo's offer to accept a verdict under either procedure should have been approved by the Court". (Russo's Brief, at p. 21; emphasis added). Of course, a jury trial is required in federal criminal cases "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government". Rule 23(a), Fed. R. Crim. P.; *Singer v. United States*, 380 U.S. 24 (1965).

Appellant, however, quotes dictum in *Singer* where the Court noted that it was not determining whether there might be circumstances where the Government's withholding consent would result in the denial of an impartial trial. The Court pointed to the argument that there could be "situations where passion, prejudice . . . public feeling or some other factor may render impossible or unlikely an impartial trial by jury". 380 U.S. *supra* at pp. 37-38. Clearly, this is not the case here nor can it be argued that appellant was deprived of an *impartial* trial. All he wanted was to avoid a retrial; a circumstance unrelated to the reservation expressed in the Court's dictum.

³⁵ We have already demonstrated that since the consent of the court is crucial to the waiver of jury trial, as concerns related rights, i.e., trial by a jury of twelve and trial without a jury, a *fortiorari* such consent is also crucial to any waiver of the unanimity requirement, if waivable at all (see pp. 29-30, *supra*).

phasis in original). The issue, therefore, is whether this right may be waived in a federal trial. According to the Sixth Circuit, the only federal court that appears to have considered this precise issue, the right may not be waived,³⁶ *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953). That Court stated that:

"[T]he right to a unanimous verdict *cannot under any circumstance be waived*, that it is of the very essence of our traditional concept of due process in criminal cases. . . ." (*Id.* at p. 838; emphasis added)

See, also, 8 Moore's Federal Practice, ¶31.02; 2 Wright, Federal Practice and Procedure, §511.

Moreover, *United States v. Vega*, *supra*, does not presage a holding that the unanimity requirement may be waived, or that the issue may be avoided by consenting to dismiss the minority jurors and accepting a verdict by a jury of less than twelve. In *Vega*, due to a gratuitous note from one juror, the parties were advised who the "primary hold-out" was.

³⁶ Not posed, however, is the interesting question of what standards should be applied if waiver is permissible. Cf. Case Note, 52 Mich. L. Rev. 911, 913 (1954). For example, would a simple majority be sufficient or must a "substantial majority" be convinced. *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972). Or, is this a requirement obtaining in state prosecutions only where a unanimous verdict is permitted without regard to questions of consent or waiver? Moreover, must the waiver be made in advance of submission of the case to the jury, so the jurors would realize that a split vote could result in a verdict? See Case Note, 67 Harv. L. Rev. 897, 898 (1954). It may also be that such waiver should be in writing, signed by all the parties. Compare Rule 23, Fed. R. Crim. P. Indeed, such a written waiver provision was included in the Proposed Rule 29(a); Fed. R. Crim. P. (Preliminary Draft 1943) but, met with such criticism that it was eliminated from the final version. 2 Wright, Federal Practice and Procedure, § 511, p. 362.

As a result, the parties stipulated to an eleven person jury and excused the hold-out. This Court found that this procedure did not result in a non-unanimous verdict, but rather achieved a unanimous verdict by a jury of less than twelve. The Court relied on Rule 23(b), Fed. R. Crim. P., in reaching this result. Clearly the fact that the Government, in this case, did not consent to Russo's attempted waiver of a jury of twelve ends the issue since the consent of the Government is indispensable to such a waiver. Cf. *Singer v. United States*, *supra*. And, as shown, the Government refusal to consent is nonreviewable. *Singer v. United States*, *supra*.

Nor does *Patton v. United States*, 281 U.S. 276, *supra*, permitting waiver of the requirement of a jury of less than twelve and of a jury trial altogether, compel a contrary conclusion. In *Patton*, the Court recognized that unanimity was one of the essential elements of a jury trial; that the other elements were that the jury should consist of twelve persons; and that the trial shall be before a judge vested with the requisite authority. The *Patton* Court held that since a jury trial may be waived, a necessary corollary is that the case could be decided, following a stipulation of the parties and consent of the court, by a jury of reduced number (*Id.* at 299). However, we submit that this would still require the trial, if it is to still be considered a federal jury trial, to meet the two other specified elements, namely, unanimity and before a judicial officer with requisite authority. We contend that to hold otherwise concerning the unanimity requirement would permit a highly dangerous innovation, especially when devised in the midst of a hotly contested trial.

Finally, Rule 31(a), Fed. R. Crim. P., requires that: "The verdict shall be unanimous". There is no express provision for the waiver of this right as there is for the right to a jury trial, Rule 23(a), Fed. R. Crim. P., and

the right to a jury of twelve, Rule 23(b), Fed. R. Crim. P. Thus, even if the Constitution does not bar waiver of a unanimous verdict, we submit that such a waiver is prohibited by the Federal Rules of Criminal Procedure. Case Note, 67 Harv. L. Rev. 896, 897 (1954). Certainly, Congress (or the Supreme Court) if it deemed it advisable, assuming no constitutional prohibition, could have allowed for waiver. Its failure to do so, therefore, constitutes a statutory proscription against anything other than a unanimous jury verdict.

POINT V

The Indictment Against Appellant Was Not Fraudulently Obtained As Knowingly Barred By The Statute Of Limitations.

Chiappe contends that the indictment here was obtained by the prosecutor's intentional and deliberate presentation of misleading testimony to the Grand Jury. Without support in the record, Chiappe baldly asserts that the Grand Jury was misled in order to avoid the claimed running of the statute of limitations and that the the statute of limitation." Such argument, we contend, should be rejected by this Court as frivolous.³⁷

Initially, and most important, we point out that the statute of limitation defense was presented to the jury

³⁷ We note, in connection with Chiappe's assertion that Nicoli thereafter "conformed his testimony to the needs of the statute of limitations" (Chiappe's Brief, at p. 11), that Nicoli had testified at the January 1976 trial of co-defendant Francois Rossi on the same indictment, that Chiappe had been involved in the February 1968 transaction (565). Significantly, Chiappe was not on trial in that case, and, indeed was living in Argentina at the time. Accordingly, Nicoli had no motive to falsely attribute the February, 1968 transaction to Chiappe.

at the request of Chiappe (1280-84). The jury, by its guilty verdict, rejected this defense. This, of course, is the complete answer to the argument.

Appellant's point seems to be that when Nicoli testified in the Grand Jury on February 15, 1973, he was not asked by the prosecutor whether Chiappe, "split up with" him and Rossi in December, 1967 to enter the narcotics traffic on an independent basis as reflected in a report of Special Agent Ronald Provencher Drug Enforcement Administration (Report of January 20, 1973; Govt. Ex. No. 3500-4). Agent Provencher's report, however, was vague and inconclusive, and indeed, it turned out to be incorrect to the extent that the "split up" occurred in February, 1968, not in December, 1967.

Finally, it hardly seems necessary to note that a defendant must prove his affirmative withdrawal from a conspiracy. *United States v. Panebianco*, 543 F.2d 447 (1976); otherwise the presumption is that the conspiracy was ongoing. Here, that is precisely what the Grand Jury evidence showed—an ongoing major international narcotics conspiracy of which Chiappe was a member.

Accordingly, the claim should be rejected.

POINT VI

The District Court Properly Denied Chiappe's Post-Trial Request For A New Trial.

Chiappe contends that his post-trial motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure was incorrectly denied. In this motion he claimed that the Government had intentionally suppressed relevant evidence by its failure to obtain and bring to the United

States, for production as "3500" or as "*Brady*" material, certain Argentine court records. This argument totally fails, since Judge Mishler in denying the motion necessarily determined that the evidence was not suppressed, that it was not in the possession of the United States, that Chiappe's counsel had not exercised due diligence in obtaining these materials at or before trial, and even so, denied the claim in its merits.

But, Chiappe ignores these findings which bar reaching the merits of his claim and nevertheless argues that these records would have established that Argentine Police Officer Borsalino lied when he testified about Chiappe's 1968 arrest and the incidental seizure of money, false identification and photographs from Chiappe and his wife.³⁸ Appellant's entire point appears to be that Argentine court records would have proved that Borsalino lied when he testified that Chiappe's arrest occurred on May 17, 1968, when in fact according to Chiappe, the arrest occurred on May 15, 1968. It is further argued that these documents would have established that Mrs. Chiappe had legitimately possessed the money seized from her. The significance of the former is, allegedly, that if counsel could have established that Borsalino had lied when he testified about the date of the 1968 arrest, it would somehow have corroborated Chiappe's hearing testimony that he had been tortured in 1958 by the Argentinian police, which would have resulted in the exclusion of the evidence. The alleged significance of the latter is that, absent this information of so-called

³⁸ Borsalino also testified before the jury about this evidence after it was determined to be admissible. Borsalino, however, was dressed in civilian clothes and he was not wearing "a *crisp* uniform" as alleged in appellant's brief (Chiappe's Brief, p. 39; emphasis added). Indeed, this gratuitously incorrect assertion characterizes, we submit, the contrived nature of this entire argument.

lawful possession by Mrs. Chiappe, the prosecutor was permitted to improperly argue that the \$19,000 were narcotics proceeds.

We disagree. First, we contend that these Argentine court records do not, in any manner, support these claims. Moreover, we contend that these Argentina court records, not in the possession of the United States, were available to appellant or could have been obtained at or before trial in the exercise of due diligence. Thus, this argument, we respectfully submit, should be rejected.

Turning first to the lack of due diligence exercised by appellant. Judge Mishler found that Chiappe had not shown due diligence (Transcript, March 4, 1977, p. 22). This finding is amply supported by the record. Thus, his denial of the motion, on this ground alone, was correct since "[i]t is basic that a defendant seeking a new trial must establish that the newly discovered evidence could not with due diligence have been discovered at or before trial" *United States v. Natelli*, Dkt. No. 76-1494, Slip op. 2557, 2560 (2d Cir. March 28, 1977).

Well before the trial began, Chiappe had obtained an order to take various depositions in Argentina concerning the merits of the case and the claimed *Toscanino* violations. Thereafter, and following several visits by Chiappe's lawyer, Gino Gallina, Esq., to Buenos Aires, Mr. Gallina and Assistant United States Attorney Peter Schlam, went to Buenos Aires in October, 1976 to take the depositions. (771). When he was in Argentina Mr. Gallina, admittedly, conferred with Dr. Baderman, an Argentinian attorney, who represented Chiappe at the time of the 1968 arrest (253-254; 835-836). Also, concededly, Mr. Gallina discussed the 1968 arrest with Baderman, who allegedly stated that "he [Baderman] participated in hearings in which all this [the items seized from Chiappe] were suppressed" (253). Interestingly,

despite the request of Judge Mishler to "wire down immediately" to Argentina for proof of this allegation, no proof has, to this very day, been forthcoming.³⁹ Mr. Gallina, however, later on in the trial claimed that he had "only spoke [sic] to Dr. Baderman basically on the alibi defense, which was the only reason I really went to see him. The discussion about this matter [the 1968 arrest] was just tangential" (836).

On the second day of trial, November 23, 1976, when the prosecutor sought to introduce the evidence obtained from Argentina, Mr. Gallina objected on the ground that allegedly he had not been advised in advance that the Government would seek to introduce this evidence (259). The Court, obviously troubled by this claim in face of the prosecutor's statement that "[a]pproximately two weeks ago in my office I showed Mr. Gallina every single item which is now the subject of the discussions we are having" (273), nevertheless held a hearing on Chiappe's motion to suppress this evidence. The Court however did state that the motion "may be untimely" (276). Seven days later, during the hearing held on November 30, 1976, Mr. Gallina cross-examined Judge Niklison as to whether he had brought the Argentine court files to the United States. He stated that he had not. (770-771). At this point, Judge Mishler told Mr. Gallina, that if he "wanted the rest of the week to fly down to Argentina, *I'd give it to you.*" Mr. Gallina's response was "I have no need to." (772).

These facts, with respect to the defense awareness of the 1968 events, coupled with the opportunity provided by the Court to obtain, for use at trial the allegedly newly-discovered evidence, we submit, compels the conclusion that the defense did not exercise the required

³⁹ Judge Niklison testified that there is no procedure in Argentina for the suppression of evidence (752).

due diligence. *United States v. Stofsky*, 527 F.2d 237, 244-245 (2d Cir. 1975). Thus, the motion was properly denied.

Before now turning to a discussion of the allegedly newly discovered evidence, however, it should be recalled that the United States did *not* have this evidence in its possession. At all times the documents were on file, in the courthouse in Buenos Aires, Argentina, which was a public building. (Schlam Affidavit, p. 4; Chiappe's Appendix). This file, which was reviewed by Assistant United States Attorney Schlam, who simply looked for photographs of persons and false identification, consisted of approximately ten volumes each containing approximately two hundred pages all in Spanish which Mr. Schlam does not read or speak (*Ibid*). We contend that there was no obligation on the Government with regard to these foreign court records.⁴⁰

The documents, themselves are, at best, vague and inconclusive. They do not establish or even tend to suggest that Argentine Police Officer Borsalino's testimony was not truthful concerning Chiappe's May 1968 arrest in Argentina. They do not, in any way, establish that the \$19,000 belonging to Chiappe, which was taken from his wife, was not arguably the proceeds of Chiappe's narcotic trafficking activities. Moreover, none of these documents are or contain statements of Borsalino, and therefore could not have been used to impeach him.

⁴⁰ Contrary to appellant's argument (Chiappe's Brief, p. 41), these foreign court records are not statements to "an agent of the United States]" required to be turned over at trial pursuant to 18 U.S.C. § 3500(a). Nor do they constitute evidence favorable to a defendant in the possession of the United States which must, of course, be turned over. *Brady v. Maryland*, 373 U.S. 83 (1963). As established below, *infra*, pp. 42 to 44, the documentary evidence was neither exculpatory nor impeachment material.

Turning to the alleged newly discovered evidence. Document #1⁴¹ (letter dated June 6, 1968, from Dr. Frager) concerns the arrest of Lucien Sarti and in no way refers to Chiappe. Document #2 (undated report of Argentine Police officials) sets forth the fact that two French police officers examined composites of Argentine bank robbery suspects on May 15, 1968 and told the Argentine police that one of the composites resembled Chiappe. The document further indicates that the Argentine police received information that Chiappe resided at a certain address. It does not state that Chiappe was arrested on May 15, 1968. Document #3 (an excerpt of judicial papers signed by Federal Judge Inchausti) refers to Chiappe's complaint that he had confessed to the bank robbery because of alleged coercion. The document is undated and does not contain the date of Chiappe's arrest. Document #4 (an unsigned excerpt of judicial papers) also undated, apparently refers to Lucien Sarti's statement to the Argentine police that he recognized photographs of Chiappe and one Dos Santos. The document also sets forth Sarti's statement that his reason for going to Chiappe's house on the date of Sarti's arrest was to celebrate Chiappe's birthday. This document, however, does not contain the specific date of Chiappe's arrest, and we note that Chiappe's conclusion that Sarti must have been referring to May 15th, because that is Chiappe's birthday, disregards Chiappe's frequent use of false identifications, bearing dates of birth other than May 15, 1920. For example, Chiappe's Bianchi identification papers listed his date of birth as May 29, 1920 (Govt. Ex. Nos. 59 and 60; 991); Document #5 (judicial

⁴¹ The numbers correspond to the numbering given to these documents by appellant when filed below on March 2, 1977, as a part of a "Supplement to Motion For New Trial." (Chiappe's Appendix).

notice signed by Judge Inchausti) dated May 24, 1968, consists merely of a notice that Chiappe's incommunicado status was terminated as of that date on the ground "that it is no longer necessary." In contrast to Chiappe's contention that it was lifted only because the ten day period had elapsed thereby proving, according to him, that his arrest occurred on May 15th, we suggest that the words of the document indicate that the status was terminated due to lack of necessity to continue to hold him incommunicado, rather than to the expiration of a legal time requirement. Document #6 (letter to Court House Commissioner from the Federal Police) also dated May 24, 1968, merely recites that the order terminating Chiappe's incommunicado status was issued. Once again, it does not refer to the date of arrest. Document #7 (letter to Judge Inchausti) dated May 27, 1968, contains Chiappe's statement that he was in a cell on May 15, 1968 at Police Headquarters and subsequently tortured by the Argentine police. The document simply shows that Chiappe told an Argentine doctor that he was in custody on May 15, 1968.⁴² Document #9 (excerpt from judicial records signed by Judge Inchausti) concerns statements made by Lucien Sarti to a judge in Argentina on June 6, 1968. Sarti is reported as having claimed during this proceeding that his initial statements to the Argentine authorities that he had not been tortured were false, and that he wished on that date to state that he had been tortured. He further stated that the alleged torture had occurred on May 15 and 16, 1968. In addition to Sarti's admission that he had previously lied to an Argentina judge, we suggest that Sarti's credibility can be further measured by his insistence to the judge that his true name was Luciano

⁴² Document # 8 is an illegible copy of a newspaper article which was not translated.

Shanchez. But, in any event, document #9 does not even mention Chiappe.

Analysis of the unnumbered documents⁴³ shows that they, too, are inconclusive. The first attached document (Judicial record signed by Judge Inchausti), dated February 26, 1969, summarizes the investigation and *indeed* states that "on 5-17-68 the Robbery theft Sect. of the Federal Police advised that it had proceeded with the arrest of the mentioned Chiappe and Sarti". This, then, supports the conclusion that the arrest was on May 17, 1968 and *not* on May 15, 1968. The second document (unsigned letter to Judge Inchausti), undated, merely discusses Chiappe's personal background. The final document, (excerpt of judicial records), dated March 26, 1969, is a memorandum that the police returned to Mrs. Chiappe the money seized from her, together with several items of clothing.

As we have demonstrated, the documents do not tend to disprove the testimony of Borsalino that Chiappe was arrested on May 17, 1968, the point concerning which Borsalino allegedly testified untruthfully. Judge Mishler found that even in the hands of a skilled cross-examiner like Mr. Gallina these documents could not have changed the verdict (Hearing, March 4, 1977, pp. 5, 23).⁴⁴ This finding, coupled with the fact that there was *no* suppression of these public documents, which in the exercise of due diligence Chiappe could have obtained for use at trial, assuming their use to be permitted, compels the conclusion that the claim should be denied.

⁴³ These documents were attached to the motion for a New Trial, filed January 24, 1977 (Chiappe's Appendix).

⁴⁴ Assuming prosecutorial suppression, which did *not* occur here, this stricter standard is the appropriate test. See, e.g., *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: June 10, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
PETER R. SCHLAM
Assistant United States Attorney,
*Of Counsel.*⁴⁵

⁴⁵ The United States Attorney's Office wishes to express its appreciation to Scott Himes, a third-year student at the Hofstra University School of Law, for his assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of June 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
Juris C. Cederbaas, Esq., 30 Broad Street, New York, New York 10004
Nancy Rosner, Esq., 401 Broadway, New York, New York 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

14th day of June 1977

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979